IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION,
LOCALS 770, 137, 905 AND 1222,

APPELLANTS,

AND

RALPH E. KENNEDY, REGIONAL DIRECTOR
OF THE 21ST REGION OF THE
NATIONAL LABOR RELATIONS BOARD, ETC.,

APPELLANT,

VS.

FOOD EMPLOYERS COUNCIL, INC.,

APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT RETAIL CLERK UNIONS LOCALS 770, 137, 905 AND 1222

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NO. 20201

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INDEX

INDEX (CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONTINUED)

Statutes — Page

Regulations

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NO. 20201

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JURISDICTIONAL STATEMENT

This is an appeal from an order entered on June 25, 1965, and an order nunc pro tunc entered June 25, 1965, by the United States District Court for the Southern District of California, Central Division, granting a "temporary injunction" against these Appellants. (TR 199, 201 - 204) Appellants appeal only from Paragraph (c) of the Order Granting Temporary

Injunction (TR 204, lines 1 - 6) and from Paragraph (c) of the Order Nunc Pro Tunc. (TR 199, lines 23 - 32 and TR 200, lines 1 - 2) The underlying action was brought by the Appellant Regional Director for and on behalf of the National Labor Relations Board to enjoin these Appellants from the commission of acts which the said Regional Director alleged he had reasonable cause to believe were in violation of Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(e), 48 Stat. 944. The District Court's jurisdiction was invoked under Section 10(1) of the National Labor Relations Act, 29 U.S.C. Section 160(1), 48 Stat. 946. Notice of Appeal was filed in the District Court by these Appellants on June 25, 1965 (TR 224 - 225), and this Court by its order dated July 2, 1965, as corrected July 14, 1965, has ordered the case expedited pursuant to Section 10 of the Norris-LaGuardia Act, 29 U.S.C. Section 110, 47 Stat. 70.

STATEMENT OF THE CASE

1. The Facts of This Case: The Regional Director of the National Labor Relations Board, on January 8, 1965, petitioned the District Court for an injunction preventing these Appellants and Appellee, Food Employers Council, Inc., from "maintaining, giving effect to, demanding arbitration of, submitting to arbitration, or enforcing Article I, Sections A, B and F(1) and (2)" of a labor agreement entered into between

these Appellants and Appellee on or about April 1, 1964, (TR 18, Government's Exhibit 1, and Petitioner's Exhibit 1) insofar as these clauses require employees of persons doing business with the Appellee Food Employers Council to become members of Appellant Unions' bargaining unit as a condition to performing work in retail food markets. Prior to the filing of the present petition, on June 30, 1964, the then Acting Regional Director of the 21st Region of the National Labor Relations Board filed a similar petition, in substance alleging the unlawfulness of the same clauses of the labor agreement. (TR 15) On the same date, these Appellants, Appellee, Appellant Local Unions 324, 899, 1167, 1428 and 1442, and Appellant National Labor Relations Board entered into a stipulation to refrain from unfair labor practices, which stipulation was approved by the court and filed on the same date. (TR 15) Thereafter, on November 10, 1964, Appellant Retail Clerks Union, Local No. 770, demanded of Appellee implementation of the grievance and arbitration procedure of the labor agreement and on November 24, 1964, filed a complaint for injunctive relief and for order compelling arbitration in the Superior Court of the State of California for the County of Los Angeles. (TR 16) The Regional Director then took the position that the said complaint was in violation of the stipulation to refrain from unfair labor practices entered into June 30, 1964, and therefor filed the present petition. (TR 16) Prior to issuance of the Order Granting Temporary Injunc-

tion in this case, the action in the Superior Court was dismissed. (Reporter's Transcript, p. 20)

2. The Proceedings before the National Labor Relations Board: Pursuant to Section 10(b) of the Labor Management Relations Act, as amended, 29 U.S.C. 160(b), 48 Stat. 926, a hearing has been conducted before a Trial Examiner of the Board in which participated all Appellant Unions, Appellant National Labor Relations Board, and the parties appearing on this appeal as amici curiae in which these Appellants vigorously defended the legality of the clauses in issue. (Reporter's Transcript, p. 8) The parties hereto await the recommendation of the Trial Examiner and action upon his recommendation by the Board.

3. The Proceedings in the District Court: After the filing of the petition for injunctive relief and prior to May 27, 1965, a stipulation entered into by the petitioner and all respondents was lodged with the District Court for its approval. (TR 160) Under the terms of this stipulation, these Appellant Unions and Appellee agreed to refrain from enforcing in any manner the clauses of the labor agreement alleged to be violative of the Act. Specifically it was agreed with the National Labor Relations Board that any arbitration award secured by any of the Appellant Unions or by Appellee touching upon the said clauses would be in no way effectuated until submitted to the Regional Director of the 21st Region of the Board and he had determined such award was neither repugnant to

nor violative of Section 8(e) of the Act, cited supra. (TR 162) In addition, it was agreed in the stipulation that, should the Regional Director subsequently have reasonable cause to believe that any of the provisions of the stipulation were violated, he could, upon affidavit and without notice to the other parties to the stipulation, request the court to enter a temporary injunction in the form attached as Exhibit A to the stipulation. (TR 162, 164 - 167) On May 27, the District Court, the Honorable Peirson Hall, Presiding, filed its Memorandum Decision denying the request for approval of the stipulation. (TR 168 - 169) Upon motion for reconsideration filed by the National Labor Relations Board June 3, 1965 (TR 170), the court again ruled, on June 14, 1965, that the injunctive relief to be granted in response to the petition "should include an order enjoining the proceeding with the arbitration." (Reporter's Transcript, p. 51) The order signed, filed and entered by the court, June 24 and June 25, 1965, provided, in relevant part, that Appellants and Appellee were enjoined and restrained from:

> "(c) Engaging in or carrying on arbitration proceedings now scheduled on or about July 5, 1965, or at any other time submitting to arbitration or arbitrating any issue or dispute arising out of Article I of the Clerk's Agreement, including, but not limited to, the seven points of dispute outlined in the letter of March 19, 1965, from Retail

Clerks Union, Local 770, to Robert K. Fox, President, Food Employers' Council, Inc." (TR 202, 205)

The letter of March 19 was an exhibit to a motion for leave to file points and authorities filed by Appellants. (TR 188)

On June 25, 1965, the District Court, at the request of a charging party (TR 195), signed, filed and entered an Order Nunc Pro Tunc changing Paragraph (c) of the Order Granting Temporary Injunction to read as follows:

> "(c) Engaging in or carrying on arbitration proceedings now scheduled on or about July 5, 1965, or at any other time submitting to arbitration or arbitrating any issue or dispute arising out of the provisions of Article I of an agreement dated March 14, 1964, between the Clerks and Employers and others, which are in dispute in proceedings before the National Labor Relations Board, and which pertain to the performance of work within the markets by employees of distributors, suppliers, rack-jobbers, or concessionaires, including, but not limited to, the seven points designated to be in dispute in a letter dated March 19, 1965, from the Retail Clerks Union 770 to the President of Food Employers' Counsel (sic)." (TR 199 - 200)

STATUTES INVOLVED

I

THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED, BY PUBLIC LAW 86-257, 1959, PROVIDES, IN PERTINENT PART, AS FOLLOWS:

A. Section 8(e), 29 U.S.C. 158(e) provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void:. . . ."

B. Section 10(a), 29 U.S.C. 160(a) provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory

to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

C. Section 10(b), 29 U.S.C. 160(b) provides:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved

thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

D. Section 10(1), 29 U.S.C. 160(1) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or

section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and

will become void at the expiration of such period. Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

II

THE NORRIS-LaGUARDIA, ANTI-INJUNCTION ACT, PUBLIC LAW NO. 65, 72nd CONGRESS, 47 STAT. 70, 29 U.S.C. 101, ET SEQ., PROVIDES, IN PERTINENT PART, AS FOLLOWS:

A. Section 1, 29 U.S.C. Section 101, provides:

"No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act."

B. Section 4, 29 U.S.C. Section 104, provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any

action or suit in any court of the United States or of any State;

* * * * * *

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;. . . ."

SPECIFICATION OF ERRORS RELIED ON

1. The District Court Erred in Granting Injunctive Relief to Persons Not Entitled Thereto and Not Parties to the Action.

2. The District Court Erred in Refusing to Approve a Stipulation in Settlement of the Petition for Injunctive Relief Entered Into and Approved by the National Labor Relations Board.

3. The District Court Erred in Enjoining Conduct Not Complained of by the National Labor Relations Board and Not Violative of the Labor Management Relations Act, As Amended.

4. The District Court Erred in Modifying or Changing the Terms of its Order by an Order Nunc Pro Tunc.

QUESTIONS PRESENTED

1. Whether, in an action which can be brought only by the National Labor Relations Board, the District Court may

treat private interests as parties petitioner and grant them relief beyond that prayed for by the Board.

2. Whether the Labor Management Relations Act, as amended, grants jurisdiction to the District Court in such a proceeding to refuse to accept a settlement agreement deemed by the National Labor Relations Board to be in the public interest and expressly entered into and approved by the Board.

3. Whether the Labor Management Relations Act, as amended, and the Norris-LaGuardia Anti-Injunction Act, prohibit the District Court in such a proceeding from enjoining conduct which the Board has not alleged to be an unfair labor practice and which does not violate the Labor Management Relations Act, as amended.

4. Whether the District Court may, under Federal Rule of Civil Procedure 60(a), alter or modify the terms of a judgment after entry thereof because the considered judgment of the court was either legally or factually in error at the time entered.

SUMMARY OF ARGUMENT

The Congress of the United States, in its enactments of the Norris-LaGuardia Act and the Labor Management Relations Act, constructed an exclusive procedure for the protection of the rights of the public and of parties to labor disputes by injunctive relief. Within this statutory scheme, only the

National Labor Relations Board may seek and obtain relief to enjoin the commission of acts believed by the Board to be unfair labor practices, and it does so in the pursuit of the interest of the public welfare, not that of any private litigant. Such functions as the Congress has conferred on the Board may neither be usurped nor appropriated to obtain relief in furtherance of an individual interest. If such usurpation is allowed to occur, the District Court has been transformed into a forum for the litigation of solely private interests in contravention of the clear Congressional mandate.

If it is clear under the decisions of the United States Supreme Court and of the Court of Appeals of this Circuit that the power to initiate proceedings under Section 10(1) of the Labor Management Relations Act and the discretion to name the relief prayed for therein are functions assigned by the Congress to the Board so that the public interest shall at all times be represented by a public body, then it is equally clear that the District Court cannot refuse its approval of a settlement agreement proposed by the Board as furthering the purposes of the Act and the public interest, in the absence of a showing of grave injury to such purposes and such interest.

I. THE LABOR MANAGEMENT RELATIONS ACT PROHIBITS THE ISSUANCE OF INJUNCTIVE RELIEF UPON THE APPLICATION OF PRIVATE PARTIES.

Section 10(1) of the Labor Management Relations Act, cited supra, requires the Regional Director for the National Labor Relations Board Board to petition the District Court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." Elsewhere in the Act, Section 10(a), cited supra, empowers the Board "to prevent any person from engaging in any unfair labor practice. . .affecting commerce." The Norris-LaGuardia Act, enacted into law prior to the Labor Management Relations Act, as amended, expressly denies to the District Court the jurisdiction to issue an injunction in a labor dispute which prohibits any person from "assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute."

In interpreting these and other sections of the Labor Management Relations Act relating to the jurisdiction of the Board, the United States Supreme Court has consistently construed such jurisdiction in the prosecution of an unfair labor practice case to be exclusive. In Amalgamated Utilities Workers v. Consolidated Edison, 309 U.S. 261, 60 S. Ct. 561, 84 L.ed. 738 (1940), in considering a petition of the Board to enforce one of its orders, the court held:

> "Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be

made effective.

"Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." (309 U.S. at page 264)

In interpretation of the powers conferred upon the Board by Section 10(a) of the Act, the court emphatically held:

"The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

* * * * * *

"What Congress said at the outset, that the power of the Board to prevent any unfair labor practice as described in the Act is exclusive, is thus fully carried out at every state of the proceeding." (309 U.S. at pp. 265 - 266)

The Supreme Court has, in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S. Ct. 1428, 8 L.ed.2d 440 (1962), defined the position of Section 10(1) in the statutory scheme composed of Norris-LaGuardia and the Labor Management Relations Act. The court was there faced with the contention that

Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), 61 Stat. 156, empowered a private litigant to seek injunctive relief in the District Court in an action arising out of the violation of a labor agreement between an employer and a union. Section 301(a) authorizes "suits for violation of contracts between an employer and a labor organization. . .", but the court specifically held that such an action could not support a claim for injunctive relief holding, 370 U.S. at p. 203:

> "(Section 301) was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation."

It was specifically held in Sinclair Refining, Supra, that Section 302(e) of the Labor Management Relations Act, 29 U.S.C. Section 186(e), 61 Stat. 157, "stands alone in expressly permitting suits for injunctions. . .by private litigants. . . ." (370 U.S. at p. 205, FN 19) Section 302 relates to restrictions on payments to employee representatives and is not in issue in this case.

The Supreme Court in Sinclair Refining, supra, interpreted the intent of Congress as expressed in the Norris-LaGuardia Act as "(leaving) not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself." (370 U.S. at p. 202)

In accord, see also Capital Service, Inc. v. NLRB, 374

U.S. 501, 974 S. Ct. 700, 98 L.ed. 891 (1954); National Licorice Co. v. NLRB, 309 U.S. 350, 60 S. Ct. 569, 84 L.ed. 799 (1940); Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L.ed. 1939 (1945); and NLRB v. Lewis Food Co., 357 U.S. 10, 78 S. Ct. 1029, 2 L.ed.2d 1103 (1958), affirming decision of the United States Court of Appeals for the Ninth Circuit in NLRB v. Lewis Food Co. (1957), 249 F.2d 832.

The Supreme Court of the United States has not been called upon to directly answer the questions which are here involved. However, these Appellants believe and respectfully urge that the holdings in Sinclair Refining, supra, and in Amalgamated Utilities Workers, supra, compel the conclusion that it must be, at all stages of the proceeding, the Regional Director who is the moving party in securing the injunctive relief sought.

The question of participation by those persons referred to in Section 10(1) as "charging parties" has been presented to the Court of Appeals for this Circuit and for the Second, Fourth and Seventh Circuits. The Court of Appeals in each Circuit has, in each case, held in accordance with the position urged by these Appellants.

In NLRB v. Retail Clerks International Association (C.A. 9, 1956), 243 F.2d 777, this Court, per Bone, C.J., held:

"We reach the conclusion that (the charging party) has no standing to petition this court for injunctive

relief against what it alleges is conduct which violates the decrees of this court." (Citing Amalgamated Utilities Workers, 309 U.S. 261, supra.)

This court in deciding Retail Clerks International Association, supra, also relied upon Stewart Diecasting Corp. v. NLRB (C.A. 7, 1942), 132 F.2d 801. This court properly interpreted Stewart Diecasting as holding that "the Seventh Circuit recognizes that only the Board has standing to prosecute proceedings in aid of its orders." (243 F.2d at 783) Also in accord is the decision of the Court of Appeals for the Fourth Circuit in Amazon Cotton Mills Co. v. Textile Workers Union (1948), 167 F.2d 183.

The Court of Appeals for the Second Circuit in McLeod v. Mechanics Conference Board (1962), 300 F.2d 237, has, perhaps, most exactly defined the position of the Regional Director and that of the charging parties in Section 10(1) proceedings in the following language:

> "Section 10(1) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of Federal Courts in labor disputes. For that reason we do not read it to allow consideration of issues not raised by the Regional Director. To do otherwise would not only increase the danger of over-involvement on the part of the Federal Courts,

but would also ignore the expertise which Section 10(1) commands us to attribute to the Regional Director. It is his view of the facts and law the District Judge is to evaluate in a Section 10(1) proceeding. (Footnote omitted.) The courts are not free to roam at will over every aspect of a labor dispute upon the request of a charging party. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." (300 F.2d at pp. 242 - 243)

The evidence in the case before this court is overwhelming that the District Court in issuing its Order Granting Temporary Injunction, including Paragraph (c) thereof, acted solely upon the insistence of the charging parties in the court below, amici curiae in this court. See, e.g., "Opposition of Intervenors, American Research Merchandising Institute, et al.", filed May 19, 1965 (TR 156), "Opposition of Teamsters Union to Approval of Settlement", filed May 10, 1965 (TR 128), followed by Memorandum of the Court Denying Approval of the Stipulation, filed May 27, 1965 (TR 168).

It is clear that even the Order Nunc Pro Tunc correcting Paragraph (c) of the Order Granting Temporary Injunction was

made solely upon the insistence and urging of the charging parties who cannot, in any sense, be said to have been aggrieved by the original order. (See "Objections of Joint Council of Teamsters, No. 42, to Proposed Order Granting Temporary Restraining Injunction Lodged by Petitioner", filed June 23, 1965, at TR 195; and Order Nunc Pro Tunc, filed and entered June 25, 1965, at TR 199.)

It is respectfully submitted that the participation by these charging parties in securing the orders in the court below is as complete participation as was sought by the charging party, Safeway Company, in the case of Retail Clerks International Association v. NLRB, decision of this court cited supra. It is further submitted that if the charging party, Safeway Company, in the Retail Clerks International Association case was properly prohibited from such participation, then the court below has erred in fashioning its relief in accordance with the desires of the charging parties in this case.

II. THE INTENT OF THE CONGRESS IN THE ENACTMENT OF THE LABOR MANAGEMENT RELATIONS ACT REQUIRES THAT THE DISTRICT COURT APPROVE A SUITABLE SETTLEMENT OF AN INJUNCTIVE PROCEEDING.

The stipulation to refrain from unfair labor practices lodged with the court, disapproved and filed May 27, 1965 (TR 160), constitutes the agreement between the National Labor

Relations Board and all parties respondent in the court below, that they will perform none of the acts listed in the prayer of the petition (TR 17-18), which prayer, of course, seeks to enjoin such activities. It is apparent from a study of the exhibit to the stipulation, a form of temporary injunction (TR 164 - 167) and from Paragraph 2 of the stipulation (TR 162, lines 16 - 26), that if the Regional Director should at any time have reasonable cause to believe that the provisions of the stipulation have been violated, he could, without any notice whatsoever to these Appellants, have entered against them a temporary injunction in the same form and to the same extent as that originally prayed for in the petition. In effect then the Regional Director and the respondents in the court below agreed that all of the relief petitioned for could be had by the Board at any time it so chose. The "Opposition of Intervenors, American Research Merchandising Institute", et al. (TR 156 - 160) discloses not a single reason, that the stipulation lodged with the court in any way would prejudice the rights of those parties, adversely affect the purposes of the Labor Management Relations Act or operate to the detriment of the public interest. The same may be said for the "Opposition of Teamsters Union to Approval of Settlement". (TR 128) Indeed, the only mention that has been made in the court below by any of the charging parties that injury might befall anyone was the statement by counsel for one of the charging parties at hearing in the District Court on June 14, 1965:

"We are very much disturbed. . .that there will be still a new set of clauses that presumptively will meet some of the objections of the Government in this proceeding, and we don't want to go through the Labor Board and then be told again, if it isn't moot by that time,. . .an arbitrator had told them to sign a new agreement, you have to start back at scratch again and see if you can get the thing stayed while the Government looks at this slightly modified clause." (Reporter's Transcript, p. 22)

Counsel was apparently referring to one of the issues contained in the letter of March 19 (TR 188) dealing with the obligation, if any, of the parties to the labor agreement to renegotiate provisions which may from time to time be invalidated as in conflict with any law, by a "court of last resort". (See Government Exhibit 1, Article XXI, p. 18)

The thrust of such an arbitral demand was stated by counsel for these Appellants at the hearing in the District Court on June 14, 1965:

"It is our position, your Honor, that what we are arbitrating here is ancillary and in no way does violence to the National Labor Relations Act, and it doesn't do violence to any one of the Sections.

* * * * * *

"We don't intend to enforce or give effect to

the clause alleged to be a violation of the Act, but we do propose to submit to the arbitrator matters of contract interpretation which both parties have agreed we can do."

In short, the court below was informed that the intent of at least part of the arbitral demand was to place parties to the labor agreement in the position referred to in the contract requiring renegotiation of invalidated clauses. Nowhere has it been contended that the "court of last resort" language of the labor agreement is itself in any way violative of the Labor Management Relations Act, and it follows that an attempt to invoke such language is protected activity under the Act.

If the holding of McLeod v. Mechanics Conference Board, cited supra, properly expresses the intent of Congress, it is improper for a District Court to consider issues which have not been raised by the Regional Director, to ignore the expertise of the Regional Director of the Board and to depart from the allegations of the petition and "to roam at will over every aspect of a labor dispute upon the request of a charging party." (McLeod, supra, 300 F.2d at p. 243) That such an inquiry was loosed in the District Court is clearly evidenced from the memoranda filed by the charging parties in opposition to the stipulation and from the District Court's refusal to approve the stipulation without any showing on the part of such charging parties of irreparable injury to the

public or to themselves.

By order of this Court, dated July 2, 1965, and corrected July 14, 1965, the charging parties in the court below have been denied their application to intervene as parties appellee and have been relegated to the position of amici curiae, consistent with the decision of Circuit Judge Bone in Retail Clerks International Association v. National Labor Relations Board, cited supra. (See 243 F.2d p. 783, footnote 12) This Court has, in Haleston Drug Stores, Inc., v. NLRB (1950), 190 F.2d 1022, similarly denied intervention to charging parties as has the Court of Appeals for the Second Circuit in Fafnir Bldg. Co. v. NLRB (1964), 339 F.2d 801, and see cases cited therein at 339 F.2d p. 802. The wisdom of this rule lies in preventing "the danger of over-involvement on the part of Federal Courts" in the statutory scheme for the administration of the Labor Management Relations Act by the National Labor Relations Board. (McLeod v. Mechanics Conference Board, supra, 300 F.2d at p. 242)

These Appellants are unable to cite to the court a case decided by a Federal Court on the narrow question of limitations of discretion that may be exercised by the United States District Court in accepting, approving or refusing the settlement of an action arising under Section 10(1) of the Labor Management Relations Act which is proposed and approved by the National Labor Relations Board. We believe, and respectfully urge upon this court, that the authorities cited herein

supra compel the conclusion that the District Court's discretion in such instance is greatly limited and that the scope of inquiry in the exercise of this discretion is, and should be, limited to a determination of whether or not such a settlement will have any adverse effect upon the policies enunciated in the Labor Management Relations Act or upon the public for whom it is administered. The Court of Appeals for the Seventh Circuit has pointed the way in this direction in Aluminum Ore Co. v. NLRB (1942), 131 F.2d 485, at p. 488:

> "This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself with helpful suggestions."

In accord are many decisions of the District Courts throughout the country. See, e.g., Douds v. Wine, Liquor and Distillery Workers Union, Local 1, et al. (S.D. N.Y., 1948), 75 F. Supp. 447; Phillips v. United Mining Workers, District 19 (E.D. Tenn., 1963), 218 F. Supp. 103.

III. THE DISTRICT COURT IS WITHOUT JURISDICTION UNDER THE LABOR MANAGEMENT RELATIONS ACT TO ENJOIN CONDUCT NEITHER COMPLAINED OF BY THE NATIONAL LABOR RELATIONS BOARD NOR IN VIOLATION OF THE ACT.

If it be remembered that the Regional Director, on June 30, 1964, filed a petition in the District Court for injunctive relief pursuant to Section 10(1) of the Labor Management Relations Act (TR 15), that on the same date and in that prior case a stipulation to refrain from unfair labor practices was executed by the Regional Director, these Appellants, and Appellee Food Employers Council, and approved by the District Court (TR 15), and that the said action was, on December 3, 1964, dismissed by stipulation of all of the said parties upon agreement that the former stipulation would remain in effect (TR 48-49), the gravamen of the petition for injunctive relief in this case is set forth in Paragraph 8 of the petition. (TR 16)

In addition to the allegations in the petition that the clauses in Article I of the labor agreement between Appellants and Appellee will have an effect proscribed by Section 8(e) of the Act, the Regional Director has alleged, in Paragraph 8 of the petition, that Appellant Local 770, in its efforts to submit certain issues regarding interpretation of the contract to arbitration and its attempt to compel Appellee to participate in an arbitral proceeding by a petition for such relief in the Superior Court, Appellant Local 770 has thereby entered

into, invoked and/or given effect to the clauses which are contended to be in violation of Section 8(e) of the Act. Paragraph 8 of the petition addresses itself solely to the actions of Appellant Local 770 seeking an order of court requiring that the Food Employers Council join in such arbitration. Thereafter, Appellant Local 770 dismissed its suit in the Superior Court for the County of Los Angeles. (Reporter's Transcript, p. 20) Thus, it is clear from the record that the principal and only conduct of these Appellants which the Regional Director deemed to be in furtherance of an unlawful contract has been fully and finally terminated by Appellants; and it is submitted that whether or not seeking the aid of a court of general jurisdiction of this State is in effectuation or furtherance of an unlawful agreement has become moot and should not have been considered by the District Court in fashioning its decree.

It follows that the arbitration which the District Court enjoined must be, if it is to take place, a voluntarily constituted proceeding at which these Appellants will urge upon the arbitrator the necessity of deciding the questions contained in the letter of March 19. (TR 188) Appellee Food Employers Council is free to appear at the proceeding and urge upon the arbitrator the issue of whether or not, under the contract, such questions as are contained in the March 19 letter are properly before him, or they may address themselves to the merits of those questions as they deem proper.

The attention of this court is directed to the issues outlined in that letter, and particularly to Paragraph 3 thereof. (TR 188-189) Appellant Local 770 has conceded its inability to place in effect the clauses under attack in the following language:

> "As a result of charges filed with the National Labor Relations Board by the Teamsters Union and certain suppliers, Article I has never become operative and cannot become operative during the term, or a substantial part of the term of our contract, because of the length of time it will require to litigate the Board complaint and subsequent appeals. There is an issue, therefore, as to whether or not the employer is being unjustly enriched because of the inoperativeness of Article I, in that the employer has been able to take advantage of the (a) broader box-boy duties, (b) new classifications with lower rates for non-food items, and (c) lower apprentice rates, which were given to the employer only upon the understanding of both parties that Article I would be effective and would confer benefits upon the Union."

And in Paragraph 6 of the letter (TR 189), Appellant Local 770 gives notice that it seeks an interpretation of an arbitrator that the employer is under an obligation to negotiate different and clearly lawful clauses with the Union

under Article XXI, Paragraph A of the contract, the "Separability Clause" which provides, inter alia, as follows:

> "A. The provisions of this Agreement are deemed to be separable to the extent that, if and when a court of last resort adjudges any provisions of this Agreement in its application between the Union and the undersigned Employer to be in conflict with any law, such decision shall not affect the validity of the remaining provisions of this Agreement, but such remaining provisions shall continue in full force and effect, provided further, that in the event any provision or provisions are so declared to be in conflict with a law, both parties shall meet immediately for the purpose of renegotiation and agreement on provision or provisions so invalidated." (Government Exhibit 1, p. 18)

The position of the Union in this letter is manifestly one of recognition that it is most probable a final decision in the proceedings before the National Labor Relations Board already concluded will not be forthcoming until close to, or after, the termination of the contract, March 31, 1969. (Government Exhibit 1, p. 24) That the Board proceedings may be expected to take fully that length of time is demonstrated in a similar proceeding, Teamsters Local 710 v. NLRB (Wilson and Company) (C.A. D.C., 1964), 335 F.2d 709. This case, upon which Appellants rely heavily before the National Labor

Relations Board, was decided by the Court of Appeals for the District of Columbia on June 25, 1964. As the report of the case indicates, the clauses alleged by the Board to be in violation of Section 8(e) of the Act were negotiated between the Union and the employer in 1961. The case was before the Court of Appeals on cross-petitions to enforce an order of the Board and for review of that order; and the Court of Appeals for the District of Columbia remanded the case to the Labor Board for further proceedings in accordance with its opinion. Although it is now five years since the clauses were negotiated, no final decision has been entered in that case. Faced with the same prospect, Appellants have sought arbitration, in part to interpret the severability clause of the labor agreement, if possible conferring upon Appellant interim relief not in violation of Section 8(e) of the Act. Thus the cornerstone of the arbitral proceeding which the District Court erroneously enjoined is, and must be, the assumption that the clauses in dispute may be found by the Board to be in violation of Section 8(e) of the Act and cannot, therefore, be given any effect whatsoever. From this reference point, Appellants seek, in the forum of arbitration, a decision as to the validity of the remaining portions of the contract.

In its Memorandum Decision of May 29, 1965 (TR 168), the District Court cited the case of McLeod v. American Federation of Television and Radio Artists, New York Local (U.S. D.C., S.D. N. Y., 1964), 234 F. Supp. 832, in support of its

decision that the stipulation lodged with the court which would allow the arbitration was improper.

In that decision, the Union sought to arbitrate what superficially appeared to be the grievance of an individual employee but which the court found, upon examination, to also contain contentions of the Union directly contrary to the position taken by the National Labor Relations Board in the major proceedings. The court held, 234 F. Supp. at p. 837:

> "Whether the employer, as a result of union pressure, must cease doing business with another employer, or must submit to compulsory arbitration, the union is still implementing an allegedly void and unenforceable clause in a contract. . . ."

That the employer here is not placed under any such compulsion to arbitrate is clear from the dismissal of the Superior Court case seeking such compulsion.

The McLeod v. Artists case, supra, also is distinguishable upon the ground that there the Regional Director for the National Labor Relations Board actively and continuously refused to allow the holding of any arbitral proceeding whatsoever, and requested that the District Court specifically preclude such a proceeding in its injunctive order. In the instant case, the stipulation to refrain from unfair labor practices (TR 160) demonstrates that the Board does not take the same position as in McLeod, at all.

Finally, this McLeod decision may be entirely distin-

guished from the instant case because the matters here to be arbitrated, as stated supra, can only arise as issues for decision by an arbitrator if he, and parties to the proceeding, assume, or concede without admitting, that the clauses under attack here are violative of the Labor Management Relations Act, and therefor cannot be enforced for the term of the agreement.

The Regional Director of the National Labor Relations Board has been attacked by the charging parties in the District Court in this case for offering the stipulation to refrain from unfair labor practices as doing so "for some undisclosed reason" (TR 131), and as having an unexplained "change of heart". (TR 135)

The explanation for the Board's willingness to inspect an arbitration award at a later date is founded on at least five major decisions of the United States Supreme Court dealing with the place of arbitration in the statutory framework of the Labor Management Relations Act, and many decisions of the National Labor Relations Board indicating its concurrence with the views of the Supreme Court. See, e.g., the "Steelworkers Trilogy", which are the landmark decisions of the Supreme Court in this field:

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L.ed.2d 1403 (1960);

United Steelworkers of America v. Warrior & Gulf

Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L.ed.2d 1409 (1960); and

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L.ed.2d 1424 (1960).

The doctrine in the Steelworker Trilogy of cases has been, if anything, expanded by the Supreme Court in its more recent decisions. In Carey v. Westinghouse Electric Corp., 375 U.S. 261, 84 S. Ct. 401, 11 L.ed.2d 320 (1964), the International Union of Electrical, etc., Workers filed a grievance with the employer under its collective bargaining agreement asserting that certain employees in a particular section of the plant who were represented by another union were performing work within the bargaining unit of the Electrical Workers. The company refused to arbitrate the dispute with the union upon the ground that nothing more than a jurisdictional dispute between two unions was involved. In ordering the employer to submit to arbitration the grievance put forth by the Electrical Workers, the court held (375 U.S. at p. 268):

> "However the dispute be considered -- whether one involving work assignment or one concerning representation -- we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter,

resort to arbitration may have a pervasive, curative effect even though one union is not a party.

"By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those concilliatory measures which Congress deemed vital to 'industrial peace' (citing case) and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." (Emphasis added.)

See also John Wiley and Sons, Inc., v. Livingston, 376 U.S. 543, 84 S. Ct. 909, 11 L.ed.2d 898 (1964).

The Board has, on innumerable occasions, elected to await an arbitral award and to "invoke its superior authority" only after inspection of such award. See, e.g., Insulation and Specialties, Inc., 144 NLRB No. 149 (1963), in which the Board, in a representation proceeding, elected to await the outcome of an arbitration and to inspect the award after its rendering. For a discussion of the Board's adoption of this concept, see the 28th Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1963, Chapter 3, Effect of Concurrent Arbitration Proceedings, page 38, et seq.

CONCLUSION

The record before this court, in the form of the pleadings and memoranda filed by the parties and by the charging parties, and the Reporter's Transcript of the argument in the District Court on June 14, 1965, amply demonstrates that in the proceedings before the District Court, Paragraph (c) of the Order Granting Temporary Injunction and the Order Nunc Pro Tunc was entered solely upon the formal request, and indeed the guidance, of persons who, under Section 10(1) of the Labor Management Relations Act, shall only "be given an opportunity to appear by counsel and to present any relevant testimony." The Court of Appeals for the Second Circuit in McLeod v. Mechanics Conference Board, supra, has interpreted, and we submit properly, this section of the Act to prohibit a charging party from doing any more than aiding the Regional Director in achieving the public interest and preventing such charging party's becoming the principal or only complainant. Additionally, the record shows that the District Court has enjoined activity expressly approved by the Labor Board acting in the public interest, activity which has the full support of the decisions of the United States Supreme Court.

For these reasons, Appellants ask this Court to reverse the decision of the lower court and enter its order striking Paragraph (c) from the Order Granting Temporary Injunction and

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from the Order Nunc Pro Tunc.

DATED: July 20, 1965.

Respectfully submitted,

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KENNETH M. SCHWARTZ
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By _____
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TABLE OF EXHIBITS

Exhibit (Government)	Record Page	Transcript Page	
		Ident.	Rec'd.
1. (Blue Labor Agreement)	None	31	49
2. (Voice of 770)	None	49	49
3. (Letter of 3/11/65)	None	49	49
G-1 (White Labor Agreement)	None	32	32
A (Charge and Exhibits)	21-33	48	49
B (Charge and Exhibits)	34-39	48	49
C (List of Members of Appellee)	40-42	48	49
D (Concessionaire Agreement)	43	48	49
E (List of Unions)	44	48	49
F (Stipulation to Refrain)	45-48	48	49
G (Stipulation of Dismissal)	49-50	48	49
H (Complaint in Superior Court)	51-58	48	49

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Code of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

Kenneth M. Schwartz

KENNETH M. SCHWARTZ
Attorneys

CERTIFICATE OF SERVICE

JUDITH M. MILLER certifies as follows:

I am a citizen of the United States and am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6404 Wilshire Boulevard, Suite 950, Los Angeles 90048, in said County and State; on the 20th day of July, 1965, I served the within BRIEF FOR APPELLANT RETAIL CLERK UNIONS, LOCALS 770, 137, 905 AND 1222, on the Appellants, Appellee and Charging Parties in this action, by placing a true copy thereof in an envelope addressed to their attorneys of record, addressed as follows:

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Attorney for Ralph E. Kennedy, Regional Director for National Labor Relations Board, Appellant

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and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 1965, at Los Angeles, California.

Judith M. Miller

JUDITH M. MILLER